a

RE MTD INFRAPERDANA BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING PETITION NO: D4-26-21-2003]
12 JULY 2003

b

COMPANY LAW: *Shares - Capital reduction - Petition for reduction of capital - Whether application should have been made by way of summons for directions - Rules of the High Court 1980, O. 88 r. 7(1) - Whether "co-exist" with Companies (Reduction of Capital) Rules 1972 - Companies Act 1965, s. 64*

c

COMPANY LAW: *Shares - Capital reduction - Petition for reduction of capital - Whether interests of creditors prejudiced - Whether amount owed to creditors minimal - Whether petitioner willing to set aside amount claimed - Whether claim negligible - Companies Act 1965, s. 64*

d

The petitioner, by way of an *ex parte* summons in chambers in encl. 3 applied and sought for orders that a date be fixed for the hearing of the petition for reduction of capital and that an exemption be given from holding an inquiry as to creditors as required by s. 64(2) of the Companies Act 1965. The grounds

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of the application were that the paid up capital of the said company was in excess of the company's needs and was not required for its business, that it was estimated in the event the capital was reduced, the company had sufficient monies and assets for the purpose of carrying on its business and that the petitioner had no debts. Further, the petitioner disputed the claim of

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RM86,626.16 as unpaid rent with interest until February 2003 at RM44,233.89 and further interest against the petitioner. The petitioner has assets, including deposits with relevant banks far exceeding the claim and was prepared to set aside RM170,000 or such amount as the court thinks fit pending disposal of the claim.

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The issues that arose were (i) since it was an application for a reduction of share capital under s. 64 of the Companies Act 1965, whether the petitioner should have applied by way of a summons for directions as envisaged under O. 88 r. 7(1) of the Rules of the High Court 1980 ('RHC'); and (2) whether there were merits in the application.

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Held:

[1] In an application for reduction of the share capital, it is ideal for the petitioner to proceed by way of an *ex parte* summons in chambers as envisaged under r. 5(1) of the Companies (Reduction of Capital) Rules 1972 on the basis of the latin term *specialia derogant generalibus*. However, in the event a similar application is made by way of a summons for directions as encapsulated in O. 88 r. 7(1) of the RHC, the court would still entertain it bearing in mind the latin term *generalia specialibus non derogant*. As far as the procedure to apply for reduction of share capital is concerned, both the procedures as set out in Companies (Reduction of Capital) Rules 1972 and the RHC "co-exist" with one another. (p 119 f-h)

[2] The primary concern of the court is to ensure that the interests of the creditors, if any, are not prejudiced. The court would and should make an order for dispensation where there are no creditors, or where the amount owed to the creditors is minimal having due regard to the size of the company's assets or where the company is willing to set aside the amount claimed. Here, there is a claim for a relatively small sum bearing in mind the financial strength of the petitioner. That claim, moneywise, was indeed negligible. Moreover, the petitioner has undertaken to set aside a sum greater than the claim. (p 122 d-f)

[Prayers as sought for in encl. 3 allowed.]

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Mohd Zakaria Salim [2002] 3 CLJ 530 CA ***(refd)***
Artemiou v. Procopiou [1966] 1 QB 878 ***(refd)***
Bishop of Gloucester v. Cunnington [1943] KB 101 ***(refd)***
Edgwarebury Park Investments Ltd v. Minister of Housing and Local Government [1963] 2 QB 408 ***(refd)***
IRC v. Hinchy [1960] AC 748 ***(refd)***
Loy Chin Hei v. PP [1981] CLJ 177; [1981] CLJ (Rep) 178 HC ***(refd)***
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(refd)***
Re A Lesser and Company Pty Ltd [1929] VR R 316 ***(refd)***
Re Antwerp Waterworks Co Ltd [1931] WN 186 ***(refd)***
Re Chambers and Clutten Pty Ltd [1920] VL R 330 ***(refd)***
Re Lucania Temperance Billard Halls (London) Ltd [1966] 1 Ch 98 ***(refd)***
Re Preston Motors Pty Ltd [1957] VR III ***(refd)***
Seward v. The Vera Cruz [1884] 10 App Cas 59 ***(refd)***
The Danube II [1921] P 183 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 64(1), (2), (3), 372
Companies (Reduction of Capital) Rules 1972, rr. 3, 5(1)
Courts of Judicature Act 1964, s. 17
Criminal Procedure Code, s. 388(1)
Dangerous Drugs Act 1952, ss. 6B(1)(a), 41B(2)
Rules of the High Court 1980, O. 1A, O. 1 r. 2(2), O. 25 r. 1, O. 32 r. 1, O. 88 r. 7(1)

Maritime Conventions Act 1911 [UK], ss. 8, 9
Public Authorities Protection Act 1893 [UK], s. 1

For the petitioner - Lambert Rasa-Ratnam (Nitin V Nadkarni); M/s Lee Hishammuddin

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of an *ex parte* summons in chambers in encl. 3, the petitioner applied and sought for the following orders:

(1) that a date be fixed for hearing of the Petition presented on 14th April 2003 for reduction of capital of the said Company (referring to MTD Infraperdana Bhd);

(2) that a notice stating the presentation of the said Petition and the date of hearing fixed be advertised in one issue of 'The Star' at least one (1) week before the hearing date fixed for the said Petition;

(3) that an exemption is given from holding an inquiry as to Creditors required under Section 64(2) of the Companies Act, 1965; and

(4) that such further or other relief as this Court may deem fit.

And the grounds of the application were listed in encl. 3 to be in the following terms:

(a) the paid-up capital of the said Company is in excess of the Company's needs and in the opinion of the Directors is not required for its business;

(b) it is estimated that in the event the capital is reduced, the Company has sufficient monies and assets for the purpose of carrying on its business;

(c) the Petitioner has no debts; (and)

(d) all (that) as stated in the Affidavit of DATO' AZMIL KHALILI BIN KHALID affirmed on the 11th day of April, 2003.

Now, the affidavit of Dato' Azmil Khalili bin Khalid ("Dato' Azmil") that was affirmed on 11 April 2003 can be seen in encl. 2. Dato' Azmil too affirmed two other affidavits. One was affirmed on 11 June 2003 as reflected in encl. 5. The other was affirmed on 26 June 2003 as seen in encl. 6.

The intitulement to the *ex parte* summons in chambers in encl. 3 brought into sharp focus s. 64 of the Companies Act 1965 and O. 88 of the Rules of the High Court 1980 ("RHC").

In a nutshell, encl. 3 was an application for directions, including an order pursuant to s. 64(2) of the Companies Act 1965. It was related to encl. one (1) which was a petition issued under s. 64 of the Companies Act 1965 seeking confirmation of a resolution for the reduction of the share capital of the petitioner.

The Procedural Hiccup

Since it was a reduction of share capital under s. 64 of the Companies Act 1965, why did the petitioner in encl. 3 applied by way of an *ex parte* summons in chambers and not by way of a summons for directions as envisaged under O. 88 r. 7(1) of the RHC? That would be an interesting procedural question to pose.

The Popular View

Order 88 r. 7(1) of the RHC states as follows:

> 7(1) After presentation of a petition by which any such application as is mentioned in rule 5 is made, the petitioner, except where his application is one of those mentioned in paragraph (2), must take out a summons for directions under this rule.

So, must encl. 3 be framed and phrased as a summons for directions and not as an *ex parte* summons in chambers?

It must be borne in mind that under O. 1 r. 2(2) of the RHC, the High Court Rules do not apply to proceedings for which specific rules have been made. It would be ideal to reproduce O. 1 r. 2(2) of the RHC and it is worded as follows:

> (2) These rules shall not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.

And pursuant to s. 372 of the Companies Act 1965, the Rules committee, which is constituted under s. 17 of the Courts of Judicature Act 1964, are authorised to make specific rules to govern the procedure and practice of the court in regard to the proceedings under the Companies Act 1965. That s. 372 of the Companies Act 1965 is worded in this way:

> 372. The Rules Committee constituted under the Courts of Judicature Act 1964 (Act 91), may, subject to and in accordance with the provisions of that Act relating to the making of rules, makes rules:
>
> (a) with respect to proceedings and the practice and procedure of the Court under this Act;
>
> (b) with respect to any matter or thing which is by this Act required or permitted to be prescribed by rules;
>
> (c) without limiting the generality of the provisions of this section, with respect to Court fees and costs and with respect to rules as to meetings ordered by the Court; and
>
> (d) generally with respect to the winding up of companies.

So, by way of P.U.(A) 129/72, the Rules Committee have made the Companies (Reduction Of Capital) Rules 1972 and I must refer to that specific Rules. Rule 3 of the Companies (Reduction Of Capital) Rules 1972 states as follows:

> RULE 3 APPLICATION OF RULES OF HIGH COURT
>
> 3 The Rules of the High Court for the time being in force and the general practice of that Court including the course of procedure and practice in Chambers shall apply as regards all proceedings in relation to the confirmation of any reduction of capital by the Court so far as may be practicable except if and so far as the Act or these Rules otherwise provide.

Thus, when one reads O. 1 r. 2(2) of the RHC together with r. 3 of the Companies (Reduction Of Capital) Rules 1972, it is crystal clear that where there is an express procedure provided by the Companies Act 1965 or the Companies (Reduction Of Capital) Rules 1972, that very procedure must be followed in preference to the rules as embodied in the RHC. I am of the considered view that the procedure as set out in the RHC would only be applicable where no express procedure is set down by the Companies Act 1965 or by the Companies (Reduction Of Capital) Rules 1972. By way of an analogy, I must refer to the case of *Loy Chin Hei v. Public Prosecutor* [1981] CLJ 117; [1981] CLJ (Rep) 178, a decision of Wan Yahya J (as he then was). That was a case where the accused was charged for an offence under s. 6B(1)(a) of the Dangerous Drugs Act 1952 where the maximum punishment

would be life imprisonment. The accused applied for bail in the Sessions Court but his application was rejected. Unperturbed, the accused then applied for bail before the High Court and his application was also refused. His Lordship Wan Yahya J, referred to s. 41B of the Dangerous Drugs Act 1952 and aptly said:

> I have had several occasions to look at section 41B of the Dangerous Drugs Act and it appears to me that the section contains not only express provisions which make the offence absolutely unbailable but also expresses in unequivocal language the intention of the legislature to restrict the judicial discretion as contained in the Criminal Procedure Code and other judge made laws. The expression 'notwithstanding any written law or any rule of law', to my mind, would include the provisions of the Criminal Procedure Code and also judge made laws or judicial precedents on bail. Section 41B of the Dangerous Drugs Act, being a particular subsequent legislation, must be construed as having curtailed the discretion to grant bail in drug offences punishable with death or life imprisonment previously vested in the courts by an earlier general legislation, ie, the Criminal Procedure Code. When an Act enacts something in general terms and afterwards another Act on a particular subject introduces in express terms special restrictions on that subject, then the rule of construction demands that the provisions in the subsequent particular legislation should prevail and the provisions of the earlier legislation deemed curtailed or restricted to the extent of its inconsistency with the later legislation but not necessarily repealed.
>
> The discretion as generally given by sections 388, 389 & 394 of the Criminal Procedure Code has been effectively taken away from the courts, both the Subordinate and High Courts, by section 41B of the Dangerous Drugs Act. Disconcerting as it may be for us to witness the power of the courts, especially those relating to the liberty of the subject who is accursed but yet to be proven guilty, being gradually whittled away by statute, yet when Parliament has expressed in unequivocal language its intention to curtail this discretionary power, the courts are not free to question its wisdom in providing for a deterrent procedure for an obviously baneful mischief to society, but must interpret and give effect to the law as it stands.
>
> The restriction on bail under section 41B of the Dangerous Drugs Act is absolute. Neither the courts below, nor this court, now possess the power to admit to bail any person charged thereunder with any offence punishable with death or more than five years' imprisonment, or even for lesser terms when the Public Prosecutor certifies that it is against public interest to allow bail.
>
> The application for bail is therefore refused.

Again, by way of an analogy, the case of *Public Prosecutor v. Chew Siew Luan* [1982] CLJ 354; ([1982] CLJ (Rep) 285) should be referred to. That was a case where the Federal Court had to decide whether a pregnant woman charged for trafficking in drugs could and should be granted bail. Since the accused was a woman, the court could allow her bail according to the proviso to s. 388(1) of the Criminal Procedure Code F.M.S. Cap. 6 ("CPC"). But since the offence was a drug offence, the Dangerous Drugs Act 1952 applied. The offence for trafficking in drugs is unbailable and it was not possible to allow bail. Section 41B(2) of the Dangerous Drugs Act 1952 specifically excludes the application of the provisions in the CPC. The Federal Court applied the principle of construction found in the latin term *generalibus specialia derogant* and held that s. 41B of the Dangerous Drugs Act 1952 superceded s. 388 of the CPC. Raja Azlan Shah CJ (Malaya) (as His Majesty then was) in delivering the judgment of the Federal Court aptly said (see pp. 354-355 (pp. 286-287) of the report):

> Now, the Criminal Procedure Code (F.M.S. Cap. 6) which came into force on 1.1.1927 is an enactment regulating criminal proceedings in general in the former Federated Malay States. It was amended and extended throughout Malaysia by the Criminal Procedure Code (Amendment and Extension) Act, 1976 on 10.1.1976. It cannot be gainsaid that it is a written law within the meaning assigned in section 2 of the Interpretation Act, 1967.
>
> The Dangerous Drugs Act 1952 (Revised – 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, *inter alia*, dangerous drugs, and 'to make special provisions relating to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith'. In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that section 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (Act A426) and became operative on 10.3.78. *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. (See also *Public Prosecutor v. Chu Beow Hin* [1982] 1 MLJ 135, 137). The provisions of section 3 of the Criminal Procedure Code which counsel for the respondent seeks to rely on has no relevance whatsoever to the matter in issue before us.
>
> It would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a

> legislative measure must take their colour from the context in which they appear. We do not therefore agree with the learned judge that it is open to a court to subject the express provisions regarding bail in section 41B of the Dangerous Drugs Act to the provisions relating thereto in the Criminal Procedure Code. The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must ex necessitate yield to the specific provisions of section 41B of the Dangerous Drugs Act in that regard. We should perhaps also observe en passant that any other construction would result in nullifying the purport and effect of the provisions of section 41B(1)(c) of the Dangerous Drugs Act and render otiose and ineffective a certificate of the Public Prosecutor thereunder that it is not in the public interest to grant bail to a person accused of an offence under the Dangerous Drugs Act punishable with imprisonment for five years or less.

There is another latin term that merits mention. It is this. *Specialia derogant generalibus* which simply means that special provisions derogate from the general provisions. So, applying this simple principle of construction, I must now refer to r. 5(1) of the Companies (Reduction Of Capital) Rules 1972 which requires that the application in encl. 3 must be made by an *ex parte* summons in chambers. That r. 5(1) of the Companies (Reduction Of Capital) Rules 1972 states as follows:

> When the petition has been presented, an application shall in every case be made *ex parte* by summons in Chambers to a Judge for directions as to the proceedings to be taken preliminary to the hearing of the petition or otherwise with reference thereto.

It would be germane to mention that even under the RHC, the proper procedure would be by way of a summons in chambers. Order 32 r. 1 of the RHC states as follows:

> Except as provided by Order 25, rule 7, every application in Chambers must be made by summons in Form 62.

And Form 62 as found in the RHC is worded in this way:

> **No. 62**
>
> O. 32 r. 1 **SUMMONS IN CHAMBERS**
>
> (Title as in action)
>
> Let all parties concerned attend before the Judge (or Registrar) in Chambers on …, the … day of …, 19 … at … m. on the hearing of an application on the part of (state nature of the application).
>
> The grounds of the application are (state the grounds).
>
> Dated the ... day of …, 19 …

Entered No … of 19 …
Clerk

(Seal)

…
Registrar

This summons is taken out by the plaintiff (or as may be) of (state address).
To the defendant (or as may be).

I cannot help but notice that the petitioner dutifully followed Form 62 as set out in the RHC when it filed its *ex parte* summons in chambers application in encl. 3.

In regard to Form 46 as set out in the RHC, I have this to say. It is the Form that is used in the summons for directions pursuant to O. 25 r. 1 of the RHC. And a close scrutiny of the possible prayers listed in Form 46 of the RHC would clearly show how inappropriate that Form would be for the purposes of the application in encl. 3.

I am of the considered view that an application for a reduction of share capital under s. 64 of the Companies Act 1965 must be by way of a summons in chambers as envisaged under r. 5(1) of the Companies (Reduction Of Capital) Rules 1972. That being the case, the procedure as adopted in encl. 3, in my considered view, was the correct procedure. I must vigorously apply the latin term *generalibus specialia derogant* to the situation at hand. The general law must yield to the specific law.

The Opposing View

Even if I am wrong and that the correct procedure would be by way of a summons for directions as set out in O. 88 r. 7(1) of the RHC, I have this to say. The courts in Malaysia are ever willing to overlook any procedural breach of the rules of the court provided that such a breach does not produce a serious miscarriage of justice or serious prejudice. In this context, I must refer to and seek solace in the case of *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248, CA; and to the case of *Arab-Malaysian Finance Bhd v. Mohd Zakaria Salim* [2002] 3 CLJ 530, CA. Put it in another way, any procedural irregularity which does not affect the essential justice of the case or cause prejudice may be overlooked by the court.

The justice of the case demands that this court should overlook any procedural breach so long as it does not cause prejudice to the opposite party. Just like the bail provisions for criminal proceedings as found in the Dangerous Drugs Act 1952 which supercede or override the bail provisions for criminal proceedings as encapsulated in the provisions of the CPC, the RHC which governs all the proceedings in the High Court and the Companies (Reduction Of Capital) Rules 1972 which relates to the reduction of share capital also contained procedural provisions wherein the petitioner here may resort to when filing its application to reduce the share capital. Under the RHC it must be by way of a summons for directions whereas under the Companies (Reduction Of Capital) Rules 1972 it shall be made *ex parte* by summons in chambers. In any event, in administering any of the rules as encapsulated in the RHC there is the requirement that the court or a judge shall have regard to the justice of the particular case and not to the technical non-compliance. The new O. 1A of the RHC states as follows:

> COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE
> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

The flexibility accorded to the RHC by the new O. 1A must be given effect accordingly. Proponents of the RHC would surely argue that the correct procedure in an application to reduce the share capital must be by way of a summons for directions as envisaged under O. 88 r. 7(1) of the RHC. Whereas the proponents of that famous latin term *generalibus specialia derogant* would expound the proposition that the right procedure to apply to reduce the share capital shall be by way of an *ex parte* summons in chambers as envisaged under r. 5(1) of the Companies (Reduction Of Capital) Rules 1972 bearing in mind that r. 3 of the same Rules sanctions such a procedure. The crucial words employed in r. 3 of the Companies (Reduction Of Capital) Rules 1972 would be the words that read as follows, "… so far as may be practicable except if and so far as the Act or these Rules otherwise provide", and such words, with respect, gives credence to the proposition that the correct procedure to apply when reducing the share capital shall be by way of an *ex parte* summons in chambers.

I pause here for a moment and take stock of the situation.

There is another latin term that needs to be highlighted. It is this. *Generalia specialibus non derogant.* It means that general statements or provisions do not derogate from special statements or provisions. And the best way to explain this latin term is by referring to the speech of the Earl of Selborne LC in the case of *Seward v. The Vera Cruz* [1884] 10 App. Cas. 59, at p. 68 where his Lordship succinctly said that:

> … where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.

Another case in point would be that of *The Danube II* [1921] P. 183. That was a case where under s. 1 of the Public Authorities Protection Act 1893 it stipulated a period of six months' limitation for actions brought in respect of things done in execution of an Act of Parliament or of any public duty or authority. Whereas under ss. 8 and 9 of the Maritime Conventions Act 1911, no action is maintainable to enforce any claim against a vessel or her owners, or any other person responsible for the fault of the vessel, unless the proceedings are commenced within a period of two years. So, in an action brought against an officer in charge of one of His Majesty's ships for damage by collision, the court held that the 1893 Act had not been pro tanto repealed. Lord Sterndale MR said at p. 188 of the report:

> There may very well co-exist a general limitation of all actions in respect of maritime damage to two years, and a further limitation where the action is brought against persons of a specific class to six months in the case of those persons.

This would be followed by the case of *Bishop of Gloucester v. Cunnington* [1943] KB 101. There the Court of Appeal held that s. 59 of the Pluralities Act 1838, which enacts that any agreement for letting a parsonage house in which an incumbent may be ordered to reside by the Bishop under the Act to be null and void unless it contains a condition for avoiding the agreement upon a copy of the Bishop's order being served on the occupier, was not impliedly repealed by the Rent Restriction Acts. The Court of Appeal also held that the relevant legislation showed that parsonage houses have been placed by Parliament in a special category by themselves and that they should not therefore be affected by the general legislation affecting dwelling houses.

Now, all these authorities are certainly thought provoking. The bottom line is this. In determining the general object of the legislature it is always useful to remember that effect must be given to the intention which appears to be in accord with convenience, reason, justice and legal principles. As Danckwerts LJ said in the case of *Artemiou v. Procopiou* [1966] 1 QB 878, at p. 888:

> An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available.

But "convenience" alone, standing by itself is not always a safe guide to construction (*Edgwarebury Park Investments, Ltd v. Minister of Housing and Local Government* [1963] 2 QB 408). The duty of the court is to construe the intention of Parliament and to give effect to it. Indeed this was the approach of Lord Reid in *I.R.C. v. Hinchy* [1960] AC 748, 767 when his Lordship said:

> … we can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the consequences, and however strongly we may suspect that this was not the real intention of Parliament.

Three years down the road, Lord Reid said in the case of *Luke v. I.R.C.* [1963] AC 557, 577:

> It is only where the words are absolutely incapable of construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail.

The proponents of the opposing view will say that the "words" as employed in O. 88 r. 7(1) of the RHC and the "words" as phrased and framed in r. 5(1) of the Companies (Reduction Of Capital) Rules 1972 must prevail and must be given effect. For my part, I prefer the popular view. It is purely a matter of preference. The specific law must override and supercede the general law. In summary, I will state the legal positions in this way:

(1) that in an application for the reduction of the share capital, it is ideal that the petitioner proceeds by way of an *ex parte* summons in chambers as envisaged under r. 5(1) of the Companies (Reduction Of Capital) Rules 1972 on the basis of the latin term *specialia derogant generalibus*;

(2) that in the event an application for the reduction of the share capital is made by way of a summons for directions as encapsulated in O. 88 r. 7(1) of the RHC, I would still entertain such an application bearing in mind the latin term *generalia specialibus non derogant;* and

(3) that as far as the procedure to apply for the reduction of the share capital is concerned, both the procedures as set out in the Companies (Reduction Of Capital) Rules 1972 and the RHC "co-exist" with one another (borrowing the words of Lord Sterndale MR in *The Danube II (supra)*).

That would be in accord with the justice of this particular case at hand.

Merits Of The Application In Enclosure 3

I will now examine the merits of the said application.

The *ex parte* summons in chambers application in encl. 3 was an application under s. 64(3) of the Companies Act 1965. It was for dispensation from the requirement to settle the list of creditors. The basis of the application being that there were no creditors of the company. Further directions were then sought for advertisement of the petition and for a hearing date. For completeness, it would be ideal to reproduce s. 64, sub-ss. (1), (2) and (3) of the Companies Act 1965 and I shall do so now:

> Special resolution for reduction of share capital
>
> 64. (1) Subject to confirmation by the Court a company may, if so authorised by its articles, by special resolution reduce its share capital in any way and in particular, without limiting the generality of the foregoing, may do all or any of the following:
>
> (a) extinguish or reduce the liability on any of its shares in respect of share capital not paid-up;
>
> (b) cancel any paid-up capital which is lost or unrepresented by available assets; or
>
> (c) pay off any paid-up share capital which is in excess of the needs of the company,
>
> and may so far as necessary alter its memorandum by reducing the amount of its share capital and of its shares accordingly.
>
> (2) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs:
>
> (a) every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company shall be entitled to object to the reduction;
>
> (b) the Court, unless satisfied on affidavit that there are no such creditors, shall settle a list of creditors so entitled to object and for that purpose shall ascertain as far as possible without requiring an application from any creditor the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a final day on or before which creditors not entered on the list may claim to be so entered; and

(c) where a creditor entered on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the Court may dispense with the consent of that creditor on the company securing payment of his debt or claim by appropriating as the Court directs:

(i) if the company admits the full amount of the debt or claim or though not admitting it is willing to provide for it, the full amount of the debt or claim; or

(ii) if the company does not admit and is not willing to provide for the full amount of the debt or claim or if the amount is contingent or not ascertained, an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

(3) Notwithstanding subsection (2) the Court may, having regard to any special circumstances of any case, direct that all or any of the provisions of that subsection shall not apply as regards any class of creditors.

The petitioner was incorporated in Malaysia on 9 June 1944 under the Companies Act 1965 as a public listed company. The petitioner was listed on the second board of the Kuala Lumpur Stock Exchange on 23 May 1995. The objectives of the petitioner during its formation were, *inter alia*, (see encl. 1):

3.1 To carry on the business of an investment holding company and for that purpose to invest the capital, land, and other monies of the Company in the purchase and acquisition, in the name of the Company or its nominees, of shares, stocks, debentures, debenture stocks, bonds, notes, obligations and securities issued or to be issued or guaranteed by any company, any government or other authority of whatever nature in any part of the world.

3.2 To acquire any such shares, stock, debentures, debenture stock, bonds notes, obligations, or securities by original subscription, contract, tender, purchase, exchange, underwriting, participation in syndicates or otherwise, and whether or not fully paid up, and to subscribe for the same subject to such terms and conditions (if any) as may be thought fit.

And there were other objects as stated in the memorandum of association. It is said that the petitioner is an investment holding company which also provides management services, and it is also said that the petitioner is currently not engaged in any trading or manufacturing activities. It is said that the principal asset of the petitioner is its wholly owned subsidiary MTD Prime Sdn Bhd ("MTD Prime"). Now, MTD Prime was acquired by the petitioner in October 2002 from Puncak Sabit Sdn Bhd, a wholly owned subsidiary of MTD Capital Bhd, as part of the re-structuring and rescue of the petitioner for the sum of

RM1,200,000,000 which was satisfied by the issuance of shares. According to the balance sheet, as at 31 December 2002, the petitioner had fixed assets of RM1,200,000, current assets of RM8,357,000 and current liabilities of RM3,026,000. All in, the petitioner had net assets of RM1,205,331,000.

Now, all these current liabilities have since that date been paid in full. The proforma balance sheet showed that as at March 31, 2003, the petitioner had no liabilities.

But there is one claim against the petitioner and it is this. A sum of RM86,626.16 as unpaid rent with interest until February 2003 at RM44,233.89 and further interest. The petitioner disputed that claim and the petitioner has engaged solicitors to contest the matter. It is said that the petitioner has assets, including deposits with the relevant banks far exceeding the claim. It is also said that the petitioner is prepared to set aside RM170,000 or such amount as the court thinks fit pending disposal of the claim.

Of crucial importance, at the hearing of an application under s. 64(3) of the Companies Act, 1965, is the primary concern of the court to ensure that the interests of the creditors, if any, are not prejudiced. The court would and should make an order for dispensation where there are no creditors, or where the amount owed to the creditors is minimal having due regard to the size of the company's assets or where the company is willing to set aside the amount claimed. Here, there is a claim for a relatively small sum bearing in mind the financial strength of the petitioner. That claim, money wise, is indeed negligible. Moreover, the petitioner has undertaken to set aside a sum greater than the claim and so with all these factual backgrounds, I must accede to the prayers as sought for in encl. 3.

As is usual, I need to refer to some authorities. I will do so now.

In *Re Chambers And Clutten Pty. Ltd* [1920] VLR 330, Hood J was of the view that since there were no creditors, it was unnecessary to settle a list or to advertise for creditors. His Lordship then made an order confirming the reduction of capital and swiftly adopted as the minute the resolution which had been passed by the company. In short, his Lordship was of the view that there was no need to hold an inquiry as to creditors where there were no creditors.

In *Re A. Lesser And Company Pty. Ltd* [1929] VR R 316, where the only creditors were those in respect of the day to day transactions, Lowe J held that there was no need for an inquiry as to creditors. At p. 317 of the report, this was what his Lordship said:

I will make the order confirming the reduction, and dispensing with the advertisement of the presentation of the petition and with the settlement of the list of creditors.

In *Re Antwerp Waterworks Co. Ltd.* [1931] WN 186, Bennett J dispensed with an inquiry on the undertaking of the company to keep on deposit sums in excess of its liabilities. Likewise here, the petitioner gave that kind of undertaking.

In *Re Preston Motors Pty. Ltd* [1957] VR III, Lowe J was of the view that since the interests of the creditors were protected, there was no need to hold an enquiry as to creditors.

In *Re Lucania Temperance Billiard Halls (London) Ltd* [1966] 1 Ch. 98, Buckley J held that the court will dispense with the need for an enquiry as to creditors if it was satisfied that having regard to the value of the company's liquid assets, or for any other reason, no creditor who might otherwise be entitled to object would be prejudiced by it.

All these authorities compelled me to decide encl. 3 in favour of the petitioner. For the reasons as adumbrated above, I made an order in terms of encl. 3, prayers (1), (2) and (3) thereof. I too made an order that the hearing of encl. one (1) be fixed on 24 July 2003.